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Supreme Court, U.S.
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In The

Supreme Court of the United States

RICHARD L. GORDON,

Petitioner,

vs.

COMMUNITY FIRST BANK OF NEBRASKA (formerly THE ABBOTT BANK), RICHARD J. CHAPIN, DARRELL RAUM, PAT KESLAR and TOM WILLNERD, JAMES A. HANSEN, LUCINDA GLEN, and KENT PLUMMER,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nebraska

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is a cause of action for deprivation of individual rights under 42 U.S.C. § 1983 made out when the petitioner has lost his private employment in the practice of law and has suffered damage to his reputation as the result of State action?

PARTIES TO THE ACTION

All parties to this action are contained in the caption of the case.

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REPORTS OF OPINIONS

The Opinion of the Nebraska Supreme Court in this matter is found at 255 Neb. 637, 587 N.W.2d 343 (1998). The Order of the Nebraska Supreme Court overruling Petitioner's Motion for Rehearing is contained in the Appendix herein.

STATEMENT OF JURISDICTION

(i) The Opinion of the Nebraska Supreme Court being appealed from was rendered on December 4, 1998.

(ii) The date of the Order denying Petitioner's request for Rehearing by the Supreme Court of Nebraska is February 18, 1999.

(iii) Petitioner asserts that 28 U.S.C. § 1257(a) confers jurisdiction on this Court to review on a writ of certiorari the judgment of the Nebraska Supreme Court because title, right and privilege under 42 U.S.C. § 1983 was claimed.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THIS CASE

42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for Redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

The Petitioner raised the violation of his rights to both procedural and substantive due process in his Fourth Amended Petition filed in the District Court of Douglas County, Nebraska in paragraphs 61 through 68. The Nebraska Supreme Court recognized that Petitioner had pled due process violations when it stated that Gordon had asserted two alternative theories of recovery including: "deprivation of his constitutional rights, in violation of Section 1983". 587 N.W.2d 343, 353.

The Court further acknowledged the allegations of violation of Gordon's rights in the following language:

> " . . . Gordon alleges that the individual officers and the state regulators conspired to deny him procedural due process and violated his 'constitutional right to practice in his chosen profession and liberty interest in his reputation and prospects for further employment.' Gordon further alleges that the individual officers and regulators acted 'with the intent to restrain plaintiff's first amended rights to free speech (i.e. on banking issues) and free association (i.e. representation of banking interests)' retaliation

> for prior exercise of plaintiff's first amendment rights and to deter future exercise of said rights.' . . . " 587 N.W.2d 343, 354.

The Court found that Gordon had not alleged factual allegations sufficient to constitute a cause of action under Section 1983, because Gordon did not allege a deprivation of a right, privilege, or immunity guaranteed by the Constitution or laws of the United States. 587 N.W.2d 343, 355.

Richard L. Gordon brought this action in the Douglas County District Court of Nebraska against the Defendants, Community First Bank of Nebraska, Richard Chapin, Darrell Raum, Pat Keslar, Tom Willnerd, James Hansen, Lucinda Glen and Kent Plummer for abuse of process, intentional interference with a contract, and civil rights violations under 42 U.S.C. § 1983, arising from their participation in initiating, facilitating and aiding the continued maintenance of administrative action against the Plaintiff by the Nebraska Department of Banking. In previous proceedings in the District Court, the Plaintiff's claims for abuse of process and intentional inference with the contract were dismissed as a result of demurrers filed by all of the Defendants. The relevant issue presented to the Court below was whether the bringing of this action for violations under 42 U.S.C. § 1983 stated a cause of action.

The Defendants' demurred. The demurrers were sustained, the Plaintiff was not allowed to plead over, and the case was dismissed with prejudice. The Plaintiff filed a timely appeal to the Nebraska Supreme Court. The Nebraska Supreme Court affirmed the Judgment of the Trial Court and held that the Plaintiff had failed to plead

a sufficient violation of constitutional rights to entitle him to judgment. The Court held that the pleading deficiencies could not be corrected by repleading, and affirmed the dismissal of the case.

Community First Bank of Nebraska (formerly The Abbott Bank) is a state-chartered bank. Richard Chapin, Darrell Raum, Pat Keslar and Tom Willnerd were officers of The Abbott Bank. The Abbott Bank Group Inc. (ABGI), was the holding company which owned approximately 99% of the Bank's outstanding common stock. James E. Abbott (Abbott) was the majority shareholder of Abbott Bank Group, Inc.

The Appellant, Richard L. Gordon was a member of the firm of McGrath, North, Mullin & Kratz (MNMK). From 1987 until the events which formed the basis of the Plaintiff's cause of action, the Plaintiff was general counsel to the Bank and ABGI and was responsible for managing the legal services provided by MNMK to both.

Chapin intentionally devised and concealed a plan to remove Abbott from controlling the Bank's policies and obligations. Raum, Keslar and Willnerd joined Chapin's conspiracy to remove Abbott from control of the Bank and put themselves in charge. As part of this plan to remove Abbott from control, these four officers determined that they must also remove Plaintiff from his position as general counsel and MNMK as legal counsel to the Bank. The Petition alleged that these Bank officers did the following:

> "49. To carry out their objective each began to secretly discredit the motives and abilities of Abbott and the Plaintiff. They attempted to

attract sufficient regulatory disapproval to cause Abbott's removal and prevent his plan to sell the Bank, or control the terms of any sale. At all times material herein, the Bank Defendants, acting as officers of the Bank, engaged in the following activities:

(a) attacking the viability of the credit card operation;

(b) attacking the ability of Abbott to set Bank policy and to counsel with Plaintiff, MNM&K, Coopers & Lybrand and other advisors;

(c) attacking the Plaintiff as having too much control over the affairs of the Bank;

(d) attacking the financial condition of the Bank;

(e) attempting to place the Bank in various conditions of default of its obligations to its primary lender and regulators;

(f) alleging that the Bank illegally paid Abbott's personal legal and accounting expenses;

(g) failing to timely produce a business plan for the Bank;

(h) attacking the legal fees of MNM&K;

(i) attacking the accounting fees of Coopers & Lybrand;

(j) attacking the advertising fees and services of Lovgren Advertising; and

> (k) threatening to quit their respective services to the Bank unless the regulators supported them in their efforts to 'get rid of' the Plaintiff and Abbott."

The Petition further alleged that as Abbott's efforts to sell the Bank moved forward, it became clear to the bank officers that their actions were not stopping the sale of the Bank and that they needed to take immediate action to prevent the successful culmination of Abbott's efforts. According to the Petition, the following occurred:

> "27. In the fall of 1993 and into the winter of 1994, the Bank Defendants, deciding to take advantage of an atmosphere of hostility toward the Plaintiff which they helped create, the [sic] Bank Defendants conspired to take control of the Bank's operations from Abbott and the Board of Directors of the Bank. Then the Bank Defendants positioned themselves to insure that when Abbott was removed from control, any sale of the Bank could not take place without their participation and only if they were paid sums over and above the consideration paid to stockholders. These individuals formed a joint plan or agreement with the intent of controlling the Bank so that any potential buyer would have to deal with them and thereby preserve their influence and jobs.
>
> 28. To accomplish their ulterior purpose the Bank Defendants had to devise a plan involving the Defendant Regulators. The plan had to cut off Abbott's efforts to sell the Bank by eliminating Abbott, Plaintiff, MNM&K and Blair, while at the same time make it impossible for the Bank Defendants to be discharged by Abbott once he discovered their subterfuge."

The Bank officers began a series of covert discussions with the Department of Banking, the FDIC and the Federal Reserve Bank. During the meeting, they made material misrepresentations that the Bank was engaged in unlawful and unsound banking practices, that the Plaintiff was acting as an unlicensed executive officer of the Bank, that the Bank was in a very perilous financial condition and that the Bank was in eminent danger of failure.

As a result of the discussions between the Bank officers and the regulators, the following actions were taken, without prior verification, investigation, or notice:

> "(a) On or about February 14, 1994, the FDIC issued an Order of Investigation against the Bank stating that it had reasonable cause to believe that institution-affiliated parties engaged or participated in unsafe or unsound banking practices and violations of law and regulations.
>
> (b) On February 28, 1994 the FDIC began an investigation of the Bank and issued subpoenas to carry out the investigation. The subpoenas were issued to a number of parties, including the Plaintiff, Abbott, MNM&K, Coopers & Lybrand, Shields and others.
>
> (c) On March 10, 1994 the Department of Banking entered an *ex parte* 'Emergency Order' pursuant to Neb. Rev. Stat. §§ 8-1,134 to 8-1,139 (Reissue 1991) ordering that the Bank could not terminate any officer of the Bank or force, require or coerce any officer to resign without written approval from the Department and the FDIC. . . .

> (d) On the next day, March 11, 1994, the Department issued another *ex parte* 'Emergency Order' . . . wherein it found that the Plaintiff was acting as an unlicensed executive officer in violation of Neb. Rev. Stat. § 8-1,139 (Reissue 1991) and 45 NAC 28 and ordered the Bank to immediately cease and desist from the practice of allowing Plaintiff to act or attempt to act, as an executive officer of the Bank. Copies of this Emergency Order (or an approved summary thereof) were directed to be served on 'all officers and employees of Bank, wherever located or employed'. It is believed this action was specifically intended to 'intimidate' each and every officer and employee of the Bank 'wherever located or employed'. The Plaintiff was likewise enjoined. A copy of said order is attached hereto as Exhibit 'B'."

It must be emphasized that the all of the Defendants knew, for some time prior to the issuance of the "Emergency Orders," that all of the allegations made regarding Gordon and the Bank were false.

The Petition alleged that, after the above actions were taken, the Bank Defendants, with the help and support of the Defendant Regulators (Hansen Glen & Plummer), began to pressure and intimidate the members of the Executive Committee of the Bank.

As a result of the actions set forth above, full control of the Bank was placed in the hands of Chapin, Raum, Keslar and Willnerd, who, by virtue of the Emergency Orders issued by the Department, could now operate the Bank without interference from Abbott. They quickly moved to terminate the Bank's relationship with the Plaintiff and MNMK.

The Bank, through these officers, with the help and cooperation of the Regulators, sought to sustain the "Emergency Order" despite the fact that all knew no emergency existed at the time it was issued, or at any subsequent period.

ARGUMENT

Demurrers in the State of Nebraska are controlled by §§ 25-806 through 25-810 R.R.S.Neb. (Reissue 1989). Section 25-806 provides as follows:

> The defendant may demur to the petition only when it appears on its face (1) that the court has no jurisdiction of the person of the defendant or the subject matter of the action; (2) that the plaintiff has no legal capacity to sue; (3) that there is another action pending between the same parties for the same cause; (4) that there is a defect of parties, plaintiff or defendant; (5) that several causes of action are improperly joined; or (6) that the petition does not state facts sufficient to constitute a cause of action.
>
> 'A . . . general demurrer . . . tests the substantive legal rights of the parties upon admitted facts including proper and reasonable inferences of law and fact which may be drawn from the facts which are pleaded. A petition is sufficient if from the statement of facts set forth therein the law entitles the plaintiff to recover.'
>
> . . . We have also held that pleadings are to be liberally construed, and if with such construction a petition states a cause of action against a defendant and in favor of the plaintiff,

> a demurrer thereto should be overruled . . . (Citations Omitted) *Dixon v. Reconciliation, Inc.*, 206 Neb. 45, 291 N.W.2d 230, 232-233 (1980).

When considering a general demurrer (that is, one which challenges the sufficiency of the allegations that state a cause of action), the petition is to be liberally construed, and if as so construed the petition states a cause of action, the demurrer is to be overruled. *Widga v. Sandell*, 236 Neb. 798, 464 N.W.2d 155, 157 (1991). In addition, in ruling on a demurrer, not only must the Court accept the truth of the facts well pled, but it must also accept all factual and legal inferences which may reasonably be deduced from such facts (however the Court does not assume the truth of legal conclusions). *Widga, supra*, at 157.

The Nebraska Supreme Court held that the Demurrer regarding Gordon's complaint from 42 U.S.C. § 1983 was proper because Gordon had failed to allege an infringement on constitutionally protected interests. In particular, the Court held that damage to reputation alone does not give rise to a cause of action under Section 1983, loss of *private* employment does not give rise to a cause of action under Section 1983, and even loss of employment, combined with a loss of reputation, should be brought in tort. In so holding, this Court ignored the relevant federal authorities dealing with subject and committed error.

Because, as noted by the Court itself, Gordon alleged both a loss of employment, damage to his future prospects of employment, and loss of reputation, this combination should be examined first to determine whether a cause of action was stated.

In *Paul v. Davis*, 424 U.S. 693, 47 L.Ed.2d 405, 96 S.Ct. 1155 (1976), the Supreme Court recognized that while damage to reputation alone is insufficient to establish a claim for harm to a liberty interest, *a cognizable claim will lie if a plaintiff can show loss of reputation plus some serious additional harm, such as loss of employment,* as a result of defamatory remarks by a government official. *Id.* at 710.

Courts have held that a liberty interest is implicated when a plaintiff can show both harm to his reputation and serious damage to his prospects for future employment in his profession. See *Huntley v. Community Sch. Bd.*, 543 F.2d 979, 985 (2d Cir. 1976)

The "plus factor" set forth in *Paul v. Davis* need not be termination from one's current employment, but expressly includes damage to one's ability to obtain future employment. *Paul v. Davis, supra,* 424 U.S. at 701, 709-10; *Komlosi v. The New York State Office of Mental Retardation,* 64 F.3d 810, 817 (2d Cir. 1995); *Valmonte v. Bane,* 18 F.3d 992, 1000 (2d Cir. 1994); *Allen v. Denver Public Sch. Bd.*, 928 F.2d 978, 982 (10th Cir. 1991); *Melton v. City of Oklahoma City,* 928 F.2d 920, slip op. at 14-15 (10th Cir. 1991); *McGhee v. Draper,* 639 F.2d 639, 643 (10th Cir. 1981).

What additional harm is required to be shown by a plaintiff is an issue of *fact* in a Section 1983 claim. *Komlosi,* 64 F.3d at 817; *Dobosz v. Walsh,* 892 F.2d 1135 (2d Cir. 1989). The determination of whether additional harm is present and whether that additional harm is attributable to the defendant, "would be a matter for trial, not summary judgment" nor a motion to dismiss. *Komlosi,* 64 F.3d at 817.

The Nebraska Supreme Court, citing as authority *Lynch v. City of Boston*, 989 F. Supp. 275 (D. Mass. 1997), that interference by the government with *private*, non-governmental, employment does not give rise to a cause of action under Section 1983. A review of the relevant case law shows that this conclusion is erroneous.

First, *Lynch v. City of Boston*, stands alone in the case law. The only authority cited in *Lynch* for its conclusion that a party's interest in private employment is not a protected liberty of property interest is the Massachusetts Court of Appeals case of *Wilmarth v. Georgetown*, 28 Mass. App. Ct. 697, 555 N.E.2d 597 (1990). *Wilmarth*, not surprisingly, has only been cited once as authority, and that was by the *Lynch* court itself. Otherwise, no other Court has adopted the reasoning of *Wilmarth*. However, significant federal case law supports the proposition that governmental interference with private employment rights (even absent damage to reputation) gives rise to a constitutional violation and a cause of action under Section 1983.

In *Richardson v. Chevrefils*, 552 A.2d 89 (N.H. 1988), the plaintiff was discharged from employment by the state for sexual misconduct. Without a hearing, and without notice, the plaintiff's name was placed on a sexual abuse registry. The plaintiff brought suit alleging that the action of placing him on the state registry infringed on his liberty interests by stigmatizing him as a sex abuser, with the effect of barring him from employment as a social worker *in any child care agency subject to state licensing*. As can be seen, the gist of the liberty interests sought to be protected in *Richardson* was that of *private* employment. The Court found that an individual has a liberty

interest cognizable under the Fourteenth Amendment in continuing to pursue an occupation or calling that he has theretofore exercised, which interest the government and its agents might not extinguish by imposition of a stigma or disqualification in the absence of notice and hearing prior to the government's action.

The Court, in consideration the claim, went on to state:

> " . . . see *Paul v. Davis*, 424 U.S. at 702-07, 96 S.Ct. at 1161-64, in which the plaintiff sued under Section 1983 for damages and injunctive relief on the theory that local officials acting under a State statute had deprived her of protected interests without procedural due process, when they publicly posted her name as a person to whom liquor could not be sold or given, due to her excessive drinking and its resulting social detriment. See *Constantineau v. Grager*, 302 F.Supp. 861 (E.D.Wis. 1969), *aff'd Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971). The Supreme Court affirmed the district court's ruling that due process required prior notice and hearing, reasoning that 'where the state attaches a "badge of infamy" to the citizen, due process comes into play,' *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 510 (citing *Wieman v. Updegraff*, 344 U.S. 183, 191, 73 S.Ct. 215, 218, 97 L.Ed. 216 (1952). This reasoning was then generalized into a rule that '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct., at 510.

Although *Constantineau's* expansiveness was seemingly affirmed by the quotation of this very language in the leading case on liberty interests subject to due process protection. *Board of Regents v. Roth*, 408 U.S. at 573, 92 S.Ct. at 2707, retrenchment was soon to follow. Six years after *Roth*, the Supreme Court decided *Paul v. Davis*, 424 U.S. at 693, 96 S.Ct. at 1155, which, as we have noted before, rejected reputation *per se* as a protected liberty interest, despite the language in *Constantineau* and *Roth* that had intimated otherwise. *Paul* is equally instructive for our purposes, however, in explaining the scope of *Constantineau:*

> 'We think that the . . . language in the last sentence quoted, "because of what the government is doing to him", referred to the fact that the governmental action taken in that case deprived the individual of a right previously held under state law – the right to purchase or obtain liquor in common with the rest of the citizenry. "Posting", therefore, significantly altered her status as a matter of state law, and it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards.'
>
> *Paul v. Davis*, 424 U.S. at 708-09, 96 S.Ct. at 1164.

The Court thus equated the *Constantineau* plaintiff's status, as a person entitled under State law to purchase liquor in common with the rest of the citizenry, with the status of individuals who have specifically been granted rights cognizable as liberty, such as the right to drive,

recognized in *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), and the right to go at large on parole, which was held subject to due process protection in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972):

> " 'In each of these cases, as a result of the statute action complained of, a right of status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment.' *Paul v. Davis*, 424 U.S. at 711, 96 S.Ct. at 15505." 532 A.2d 89, 94-95.

The *Richardson* Court went on to state that the *Paul* and *Constantineau* cases required a holding that the plaintiff, who enjoyed a status as a person qualified by education and experience to practice social work, was effectively eliminated by listing his name as a perpetrator of sexual abuse, thus rendering him unemployable. The Court went on to hold that, since the plaintiff's status was thus a protected liberty interest, it was a violation of procedural due process to extinguish it without giving prior notice of the intended action and the opportunity for a hearing to contest it. The Court held that the law in this area was "clearly established". 532 A.2d 89, 95-96.

In *Phillips v. Vandygriff*, 711 F.2d 1217 (5th Cir. 1983), the manager of a savings and loan association brought suit against various state officials on the grounds that industry custom had resulted in a situation where the

plaintiff could not obtain or retain employment as a bank manager in the State of Texas without the recommendation of the Commissioner of the Savings and Loan Department. The plaintiff alleged that the Commissioner repeatedly told prospective employers that he could not recommend the plaintiff for employment. The plaintiff alleged that the actions of the defendant gave rise to Section 1983 liability on the part of the Commissioner. In addressing whether or not the plaintiff had a liberty interest which was protected, the Court stated:

> "1. *Liberty Interest* – The first question is whether pursuing employment as a manager of a savings and loan is a liberty interest. 'It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [fourteenth] Amendment to secure.' *Traux v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed 131 (1915). *See also Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923) ('*Without doubt, ["liberty" in the fourteenth amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life . . .* '); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39, 77 S.Ct. 752, 576, 1 L.Ed.2d 796 (1957) ('*A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.*') (footnote omitted); *Greene v. McElroy*, 360 U.S. 474, 492, 79 S.Ct. 1400, 1411, 3 L.Ed.2d 1377 (1959) ('[T]he *right to hold specific*

private employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "Property" concepts of the Fifth Amendment. . . . '); Board of Regents v. Roth, 408 U.S. 564, 573-74, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972) (respondent denied relief because '[t]he State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case'.) This Circuit has also repeatedly acknowledged the principle that *a person has a liberty interest in pursuing an occupation. See, e.g., Ferrel v. Dallas Independent School District,* 392 F.2d 697, 707 (5th Cir. 1968); *Shaw v. Hospital Authority,* 507 F.2d 625, 628 (5th Cir. 1975); *Daly v. Sprague,* 675 F.2d 716, 727 (5th Cir. 1982).

Phillips has claimed that he was excluded from work within Texas as a manager of a savings and loan association. Under these Supreme Court and Fifth Circuit cases, it is clear that Phillips' interests in that occupation is a liberty interest within the ambit of the fourteenth amendment." 711 F.2d 1217, 1222. (Emphasis added).

In the case of *Merritt v. Mackey,* 827 F.2d 1368 (9th Cir. 1987), the court held that a former supervisor with a private non-profit corporation providing drug and alcoholism treatment had a protected interest in his employment. The Court in so holding, stated:

"To determine whether due process requirements apply to an asserted interest, the court must initially look to the nature of the interest at stake, *Board of Regents v. Roth,* 408 U.S. 564, 571, 92 S.Ct. 2701, 2706, 33 L.Ed.2d 548 (1972). It is

> indisputable that an individual may have a protected property interest in private employment. In *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959), the Supreme Court noted that 'the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the Fifth Amendment.' *Id.*, at 492, 79 S.Ct. at 1411. *See also Phillips v. Bureau of Prisons*, 591 F.2d 966, 970 (D.C. Cir. 1979); *United States v. Briggs*, 514 F.2d 794, 798 (5th Cir. 1975)." 827 F.2d 1368, 1370.

As can be seen from the above authority, a person's liberty interest in private employment has been repeatedly recognized by both state and federal authorities. The right is long-standing.

The position of the Nebraska Court that a Section 1983 action cannot be brought for deprivation of a private employment liberty interest is erroneous. Ample authority exists to support the proposition that when a individual suffers both a loss of reputation *and* deprivation of a recognized constitutionally protected right (i.e., liberty interest in private employment) and this loss occurs under color of state law, a cause of action arising under 42 Section 1983 is appropriate.

CONCLUSION

The Plaintiff alleged sufficient facts and circumstances to set forth a cause of action arising under 42 U.S.C. § 1983 for deprivation of his protected liberty interests. The Nebraska Supreme Court erred in failing to recognize these rights and specifically erred in holding that such rights do not arise when a plaintiff is deprived of private employment. Due to the significant error in constitutional law in this regard, this Court should grant certiorari for purposes of reviewing and reversing the decision of the Nebraska Supreme Court.

Respectfully submitted,

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Petitioner

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Richard L. GORDON, appellant,

v.

COMMUNITY FIRST STATE BANK, formerly The Abbott Bank, et al., appellees.

Nos. S-97-618, S-97-1183.

Supreme Court of Nebraska.

Dec. 4, 1998.

Syllabus by the Court

1. **Judgments: Demurrer: Appeal and Error.** An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken.

2. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.

3. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect.

4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.

5. **Jurisdiction: Final Orders: Appeal and Error.** In the absence of a judgment or order finally disposing of a

case, an appellate court is without jurisdiction to act and must dismiss the purported appeal.

6. **Demurrer: Final Orders: Appeal and Error.** The sustaining of a general demurrer, not followed by a judgment of dismissal terminating the litigation, does not constitute a reviewable final order.

7. **Actions: Proof.** The two elements necessary to establish an action for abuse of legal process are the existence of an ulterior purpose and an act in the use of the process not proper in the regular prosecution of the proceeding.

8. **Torts.** Abuse of process and malicious prosecution are separate and distinct torts.

9. **Actions: Proof.** In a malicious prosecution case, the necessary elements for the plaintiff to establish are (1) the commencement or prosecution of the proceeding against him; (2) its legal causation by the present defendant; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; (6) damage, conforming to legal standards resulting to plaintiff.

10. **Actions: Torts: Words and Phrases.** Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish.

11. **Actions.** With respect to a cause of action for abuse of process, the judicial process must in some manner be involved. An administrative proceeding cannot form the basis of an action for abuse of process.

12. **Res Judicata: Judgments.** The doctrine of res judicata bars relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.

13. **Judgments: Appeal and Error.** Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the appellate court will affirm.

14. **Constitutional Law: Jurisdiction: States.** Although the states have concurrent jurisdiction to entertain actions pursuant to 42 U.S.C. § 1983 (1994), as a result of the Supremacy Clause found in U.S. Const. art. VI, federal law is controlling and preempts any conflicting state law in determining these claims.

15. **Constitutional Law: Actions.** In order to state a cause of action under 42 U.S.C. § 1983 (1994), a plaintiff must allege facts establishing conduct by a person acting under color of state law which deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States.

16. **Constitutional Law.** An injury to reputation by itself is not a liberty or property interest protected under the 14th Amendment.

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Terence P. Boyle, of Boyle Partnership, P.C., and J. Michael Coffey, of Stave & Coffey, Omaha, for appellee Community First State Bank.

Joseph K. Meusey, Joseph E. Jones, and Michael J. Mooney, Jr., of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., Omaha, for appellees Chapin, Raum, Keslar, and Willnerd.

Don Stenberg, Attorney General, and Fredrick F. Neid, Lincoln, for appellees Hansen, Glen, and Plummer.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, and McCORMACK, JJ.

STEPHAN, J.

In this consolidated action, Richard L. Gordon seeks damages from Community First State Bank, formerly The Abbott Bank (Bank), and several of its officers, as well as the director and two other employees of the Nebraska Department of Banking and Finance (Department). Gordon asserts alternative theories of recovery, including abuse of process and denial of civil rights in violation of 42 U.S.C. § 1983 (1994). The district court for Douglas County sustained demurrers and entered an order of dismissal in each action, from which Gordon appeals. We conclude that we lack jurisdiction over Gordon's appeal in case No. S-97-618 with respect to the individual appellees because there is no final, appealable order as to them.

We affirm the judgment in that case with respect to the Bank, and we affirm the judgment in case No. S-97-1183 in its entirety.

I. SCOPE OF REVIEW

An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken. *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 254 Neb. 754, 579 N.W.2d 526 (1998); *Lawry v. County of Sarpy*, 254 Neb. 193, 575 N.W.2d 605 (1998).

In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Id.*

When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect. *Vanice v. Oehm*, 255 Neb. 166, 582 N.W.2d 615 (1998); *State ex rel. Wood v. Fisher Foods*, 254 Neb. 982, 581 N.W.2d 409 (1998).

II. FACTUAL ALLEGATIONS

The operative petitions in both of these actions contain similar factual allegations, which we summarize here, recalling that we must assume the truth of such allegations under the aforementioned standard of review.

The Bank is chartered by the State of Nebraska and maintains its principal place of business in Alliance, Nebraska. Approximately 99 percent of the Bank's outstanding common stock was owned by Abbott Bank Group, Inc. (ABGI), a bank holding company incorporated in Delaware. In June 1982, James E. Abbott became the majority shareholder of ABGI.

Prior to a reorganization which occurred between 1987 and 1989, Abbott's banking interests included 10 independent banks, each of which was owned by a separate holding company. In 1987, Abbott became chairman of each bank's board of directors. At that time, Gordon was a shareholder, director, and officer of an Omaha law firm which had represented the banking interests of Abbott and his family since 1978. Abbott designated Gordon as general counsel to the Abbott banks and their respective holding companies and gave Gordon broad authority to review all legal matters involving these entities. As general counsel, Gordon had an attorney-client relationship with the Bank which was founded on an oral contract.

Between 1987 and 1989, the 10 separate banks were reorganized into a single bank owned by ABGI, The Abbott Bank, resulting in the loss of each bank's local name, autonomy, and board of directors. In addition, the reorganization resulted in significant reductions in bank personnel. Gordon alleges that this reorganization created "extremely hard feelings" directed toward those perceived to be responsible for the changes, particularly Gordon and his law firm. As a part of the reorganization, the Bank instituted a credit card program, which met

with resistance from the Bank's management. Also, various actions of the Bank taken to reform policies and collect delinquent accounts furthered animosity toward Abbott and his advisors.

In 1990, Gordon advised Abbott that unless issues regarding management and leadership were addressed, it was likely that the Bank's various professional fees would increase significantly. Rather than replace management, Abbott decided to pursue a sale or merger of the Bank into a larger organization in order to resolve the management issues and realize the value of the investment in the credit card operation. Abbott informed Gordon of this decision in confidence.

In 1993, Abbott retained an investment banking firm to assist in the sale of the Bank. He intentionally did not disclose this fact to some persons on the management team. In July, the decision to sell the Bank was disclosed to Richard J. Chapin, the chief financial officer of the Bank, who later became its president. Gordon alleges that Chapin pretended to support the decision while secretly planning to remove Abbott from controlling the Bank's policies and operations. Gordon alleges that Bank officers Darrell Raum, Pat Keslar, and Tom Willnerd conspired with Chapin (collectively referred to as "the individual officers") to remove Abbott from control of the Bank and place themselves in control. Gordon alleges that the individual officers determined that in order to carry out their plan, they had to first remove Gordon from his position as general counsel.

Gordon contends that in order to attract regulatory disapproval sufficient to cause Abbott's removal and

block Abbott's plan to sell the Bank or control the terms of any sale, the individual officers (1) attacked the viability of the credit card operation, (2) attacked the ability of Abbott to set Bank policy and to counsel with Gordon, (3) attacked Gordon as having too much control over the affairs of the Bank, (4) attacked the financial condition of the Bank, (5) attempted to place the Bank in various conditions of default with its primary lender and regulators, (6) alleged that the Bank illegally paid Abbott's personal legal and accounting fees, (7) failed to timely produce a business plan for the Bank, (8) attacked the legal fees of Gordon's law firm, (9) attacked the fees of the Bank's accounting firm, (10) attacked the fees of the Bank's advertising company, and (11) threatened to quit their respective services to the Bank unless regulators supported them in their efforts to " 'get rid of' " Abbott and Gordon.

Gordon alleges that in late 1993 and early 1994, the individual officers further conspired to take control of the Bank by forming a "joint plan or agreement with the intent of controlling the Bank so that any potential buyer would have to deal with them and thereby preserve their influence and jobs." He alleges that in December 1993, Chapin hired an attorney to represent the Bank without the knowledge or approval of the board of directors. Gordon alleges that the individual officers then began a series of discussions with state and federal banking regulators in which they made the following misrepresentations: (1) that the Bank had unlawfully permitted Gordon to act as an unlicensed Bank officer, (2) that the Bank was in a very perilous financial condition, and (3) that the Bank " 'was in imminent danger of failure.' "

Gordon alleges that on January 27, 1994, Chapin met secretly with Lucinda Glen and Kent Plummer of the Department, and that during this meeting Chapin told Glen and Plummer that the Bank was failing, although he had made no such statement to the Bank's primary lender and subsequently voted to approve the Bank's budget. According to Gordon, at some point between February 28 and March 10, Glen, Plummer, and James Hansen, director of the Department (hereinafter collectively referred to as "the state regulators"), and the individual officers agreed to work together in order to wrest control of the Bank from Abbott, remove Gordon from involvement with the Bank, restrict the sale of the Bank, and guarantee the continued employment of the individual officers. Gordon further alleges that at the time this agreement was made, the individual officers and the state regulators knew that the allegations made by the individual officers were false and that all acts taking place after March 9 were done to further the agreement.

Gordon contends that as a result of the individual officers' discussions with the state regulators, the Federal Deposit Insurance Corporation (FDIC) began an investigation which led the Department to issue an emergency order pursuant to Neb.Rev.Stat. §§ 8-1, 134 to 8-1, 139 (Reissue 1991). The emergency order, issued March 10, 1994, provided that the Bank could not terminate any officer or force, require, or coerce any officer to resign without written approval from the Department and the FDIC. On March 11, the Department served a second emergency order on all officers and employees of the Bank, finding that Gordon was acting as an unlicensed executive officer, in violation of Neb.Rev.Stat. § 8-139

(Reissue 1991), and ordering the Bank to cease and desist from the practice of allowing Gordon to act in this manner. Gordon asserts that this action was meant to intimidate officers and employees of the Bank. Gordon further alleges that after the orders were issued, the individual officers began to pressure and intimidate other members of the Bank's executive committee.

Gordon requested a hearing regarding the emergency orders on March 18, 1994. He alleges that the Department sent a copy of the second order to the Omaha World-Herald newspaper. Gordon alleges that the emergency orders allowed the individual officers to have full control of the Bank without the "input or interference" of Abbott and to terminate the Bank's relationship with Gordon and his law firm. Gordon also asserts that the individual officers established a procedure that effectively prevented any Bank employee from having any contact with Gordon or his firm.

Gordon alleges that the state regulators took steps to prevent the discovery of facts that did not support the emergency orders. According to Gordon, no inquiries were made of Abbott, Gordon, Gordon's law firm, the Bank's accounting firm, or the Bank's board of directors. Gordon also states that the state regulators "took great pains" to prevent the company assisting with the possible sale of the Bank from presenting information that would conflict with the state regulators' position. Gordon further alleges that the Bank supported the actions of the state regulators and the individual officers and that these actions exposed Gordon to possible felony charges.

When Gordon appealed the second emergency order, Hansen, the director of the Department, appointed the Honorable John T. Grant, a retired member of this court, to act as the hearing officer. Gordon alleges that although the Bank and the state regulators knew or should have known that any further prosecution was "reckless," they presented evidence to Justice Grant in an effort to keep the emergency order in effect. The Bank also filed pleadings admitting to the allegations that supported the emergency orders. This, according to Gordon, exposed him, the Bank, the Bank's board of directors, and Abbott to criminal prosecution. Gordon alleges that the Department continued to prosecute its actions against Gordon when it knew that no emergency existed. Justice Grant concluded that the Department failed to carry its burden of proof and recommended that the emergency orders be set aside.

In November 1994, The Abbott Bank entered into a merger agreement with Community First State Bank, which, Gordon alleges, proves that the efforts of the individual officers to prevent the sale were not successful and that the Bank was never in an emergency condition. However, in December, Hansen rejected Justice Grant's findings and drafted an order affirming the original cease-and-desist order. Gordon appealed this order to the district court for Lancaster County, which dismissed Gordon's appeal as moot without reaching a decision on the merits. In May 1995, Community First State Bank acquired The Abbott Bank for approximately $34 million and sold the Bank's credit card receivables for approximately $10 million.

III. PROCEDURAL HISTORY

1. Case No. S-97-618

In this action against the Bank and the individual officers, Gordon alleged that these parties "caused the issuance of process and abusively pursued its application to prevent Abbott from having the representation of his choice" with respect to the sale of the Bank. Gordon stated that the alleged abuse of process caused him to lose income, reputation, and the opportunity to practice law, for which he sought special damages in the amount of $10 million and general damages in an unspecified amount. Gordon also asserted alternative theories of recovery, against the individual officers only, including intentional interference with a business relationship and violation of § 1983.

The Bank and the individual officers filed demurrers, asserting that Gordon had not alleged facts sufficient to constitute a cause of action. In a memorandum and order entered May 13, 1997, the district court sustained the Bank's demurrer and dismissed the action against it based on a determination that Gordon could not establish an abuse of process claim, because he did not allege "a misuse of judicial process issued through a court of law." The court also sustained the individual officers' demurrer but granted Gordon leave to amend with respect to his alternative theories of recovery. Gordon filed a timely notice of appeal from this order.

2. Case No. S-97-1183

In this action, Gordon asserted claims against the individual officers and the state regulators. Although the Bank is listed as a defendant in the caption of Gordon's operative petition, no claim against the Bank is asserted. Based upon essentially the same facts as those alleged in case No. S-97-618, Gordon asserts claims against the individual officers and the state regulators based upon theories of abuse of process and violation of § 1983. The individual officers and the state regulators filed separate demurrers, which were sustained by the district court in an order entered on October 14, 1997. The court reasoned that the action constituted an impermissible collateral attack on the administrative order of the Department and the final judgment of the district court for Lancaster County dismissing the appeal from that order. Thus, the district court dismissed the action with prejudice and did not grant leave to amend. Gordon perfected a timely appeal, which was consolidated with case No. S-97-618 for oral argument and disposition. Pursuant to our authority to regulate the caseloads of the Nebraska Court of Appeals and this court, we removed the consolidated appeal to our docket on our own motion.

IV. ASSIGNMENTS OF ERROR

Restated, Gordon assigns that the district court erred in (1) concluding that Gordon failed to state a claim for the tort of abuse of process, and (2) concluding that his § 1983 action was barred by issue preclusion or as an

impermissible collateral attack on an administrative judgment.

V. ANALYSIS

1. Case No. S-97-618

(a) Claims Against Individual Officers

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Fitzke v. City of Hastings*, 255 Neb. 46, 582 N.W.2d 301 (1998); *Bonge v. County of Madison*, 253 Neb. 903, 573 N.W.2d 448 (1998). In the absence of a judgment or order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal. *Future Motels, Inc. v. Custer Cty. Bd. of Equal.*, 252 Neb. 565, 563 N.W.2d 785 (1997); *State ex rel. Keener v. Graff*, 251 Neb. 571, 558 N.W.2d 538 (1997).

The district court sustained the individual officers' separate demurrer but granted Gordon leave to amend with respect to two of his three alternative theories of recovery. Our review of the record discloses no order of dismissal as to the individual officers, and this was confirmed by the parties in their joint response to an order to show cause which we issued following oral argument. The sustaining of a general demurrer, not followed by a judgment of dismissal terminating the litigation, does not constitute a reviewable final order. *Fox v. Metromail of Delaware*, 249 Neb. 610, 544 N.W.2d 833 (1996); *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995). On the

record before us, there is no order of dismissal terminating this litigation as to the individual officers, Chapin, Raum, Keslar, and Willnerd, and we therefore must dismiss the appeal as to those parties for lack of appellate jurisdiction.

(b) Claim Against Bank

As noted above, Gordon's claim against the Bank is based solely upon an alleged abuse of process. Our jurisprudence with respect to this cause of action is not extensive, and our most recent cases discussing it were decided more than 60 years ago. See, *Vybiral v. Schildhauer,* 130 Neb. 433, 265 N.W. 241 (1936); *Martin v. Sanford,* 129 Neb. 212, 261 N.W. 136 (1935). In *Martin,* we stated that the two elements necessary to establish an action for " 'malicious abuse of legal process' " are the existence of an ulterior purpose and an act in the use of the process not proper in the regular prosecution of the proceeding. 129 Neb. at 222, 261 N.W. at 141. Quoting 1 Thomas M. Cooley, Torts § 131 (4th ed.1932), we stated that " '[r]egular and legitimate use of process, though with a bad intention, is not a malicious abuse of process.' " *Martin,* 129 Neb. at 222, 261 N.W. at 141. We reiterated these statements in *Vybiral* and further noted: " ' "Abuse of process" . . . means the perversion of it, – i.e., accomplishing some illegal object or purpose for which such process was not legally intended.' " *Vybiral,* 130 Neb. at 437, 265 N.W. at 244, quoting *Dixon v. Smith-Wallace Shoe Co.,* 283 Ill. 234, 119 N.E. 265 (1918). We stated that "[t]o make out a cause of action for abuse of process, the plaintiff must prove irregular steps taken under cover of the process after its issuance, and damage resulting

therefrom." *Vybiral*, 130 Neb. at 437, 265 N.W. at 244, citing *Italian Star Line v. United States Shipping Board E.F. Corp.*, 53 F.2d 359 (2d Cir.1931).

Although the phrase "malicious abuse of process" appears in both *Vybiral* and *Martin*, we note that abuse of process is not synonymous with malicious prosecution; they are separate and distinct torts.

> " 'In a malicious prosecution case, the necessary elements for the plaintiff to establish are: (1) The commencement or prosecution of the proceeding against him; (2) its legal causation by the present defendant; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; (6) damage, conforming to legal standards resulting to plaintiff.' . . . "

Johnson v. First Nat. Bank & Trust Co., 207 Neb. 521, 526, 300 N.W.2d 10, 14 (1980), quoting *Schmidt v. Richman Gordman, Inc.*, 191 Neb. 345, 215 N.W.2d 105 (1974). Thus, "[a]buse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 121 at 897 (5th ed.1984). Historically, the tort of abuse of process " 'evolved as a "catch-all" category to cover improper uses of the judicial machinery that did not fit within the earlier established, but narrowly circumscribed, action of malicious prosecution. . . . ' " *Younger v. Solomon*, 38 Cal.App.3d 289, 296, 113 Cal.Rptr. 113,

118 (1974), citing *Italian Star Line, supra*. See, also, *Vybiral, supra* (citing *Italian Star Line, supra*).

Gordon's allegations focus on the two "Emergency Orders" issued by the Department on March 10 and 11, 1994, copies of which are appended to his operative petition. A demurrer reaches an exhibit filed with the petition and made a part thereof, so that a court can consider such exhibit in determining whether the petition states a cause of action. *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. 783, 545 N.W.2d 451 (1996). The district court held that an abuse of process claim could not be predicated upon these administrative orders because "[t]o establish an abuse of process claim, Plaintiff must allege a misuse of judicial process issued through a court of law." Our review of this determination requires us to define, for the first time, the meaning of the phrase "legal process" in the context of an action for abuse of process.

In *Vybiral v. Schildhauer*, 130 Neb. 433, 265 N.W. 241 (1936), we cited and quoted Illinois cases defining the essential elements of abuse of process. Subsequent Illinois decisions on this subject define "process" as "any means used by the court to acquire or to exercise its jurisdiction over a person or over specific property." *Holiday Magic, Inc. v. Scott*, 4 Ill.App.3d 962, 968, 282 N.E.2d 452, 456 (1972). "Process is issued by the court, under its official seal and must be distinguished from pleadings, which are created and filed by the litigants." *Doyle v. Shlensky*, 120 Ill.App.3d 807, 816, 458 N.E.2d 1120, 1128, 76 Ill.Dec. 466 (1983). See, also, *Community National Bank v. McCrery*, 156 Ill.App.3d 580, 509 N.E.2d 122, 108 Ill.Dec. 696 (1987) (stating that process is issued by court). Some jurisdictions define "process" more broadly to encompass the

entire range of procedures incident to the litigation process, including various discovery documents, entry of defaults, and the utilization of various motions filed with a court. See, e.g., *Hopper v. Drysdale*, 524 F.Supp. 1039 (D.Mont.1981); *Nienstedt v. Wetzel*, 133 Ariz. 348, 651 P.2d 876 (Ariz.App.1982); *Foothill Ind. Bank v. Mikkelson*, 623 P.2d 748 (Wyo.1981); *Twyford v. Twyford*, 63 Cal.App.3d 916, 134 Cal.Rptr. 145 (1976); *Younger, supra*. However, it is generally accepted that with respect to a cause of action for abuse of process, "the judicial process must in some manner be involved." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 121 at 898 (5th ed.1984).

Gordon argues that we should expand the generally accepted definition of "legal process" to include process issued by an administrative agency acting in a judicial or quasi-judicial capacity. Our research discloses one case supporting this proposition. In *Hillside Associates v. Stravato*, 642 A.2d 664, 669 (R.I.1994), the Supreme Court of Rhode Island held that a "misuse of an administrative proceeding may give rise to claims for malicious prosecution and/or abuse of process." The court limited its holding to "quasi-judicial contested administrative determinations or proceedings that establish the legal rights, duties, or privileges of a party" following notice and an evidentiary hearing resulting in a recorded decision. *Id.* Although recognizing the distinction between the torts of malicious prosecution and abuse of process, the court based its holding upon its "opinion that when a party invokes an administrative proceeding with malicious intent and without probable cause, that party should be subject to the same sanctions what would obtain if the action were brought in the judicial branch." *Id.* at 668-69.

The Rhode Island court further stated that "numerous jurisdictions have recognized that misuse of certain administrative proceedings may give rise to claims for malicious prosecution and abuse of process," *id.* at 668, but most of the cases cited for this proposition involved only malicious prosecution claims and none reached the specific issue of whether an abuse of process claim could be based upon process issued by an administrative agency.

With the exception of *Hillside Associates,* the cases addressing this issue have held that process issued in an administrative proceeding cannot form the basis of an action for abuse of process. The most recent is *Kirchner v. Greene,* 294 Ill.App.3d 672, 691 N.E.2d 107, 229 Ill.Dec. 171 (1998), in which the plaintiff asserted a claim for abuse of process based upon allegations that a newspaper article falsely accusing him of child abuse resulted in the initiation of investigative proceedings by the Illinois Department of Children and Family Services. After reviewing the same elements of an action for abuse of process which we identified in *Vybiral v. Schildhauer,* 130 Neb. 433, 265 N.W. 241 (1936), and *Martin v. Sanford,* 129 Neb. 212, 261 N.W. 136 (1935), the court wrote:

> Kirchner's claim fails for the simple reason that no court process was involved and, thus, it is axiomatic that there can be no abuse of process. Kirchner recognizes this fact in urging us to expand the tort of abuse of process to include proceedings undertaken by the [Illinois Department of Children and Family Services] because it is a quasi-judicial administrative body that is charged with the responsibility of adjudicating claims of child abuse. Such expansion is baseless

> in the law and would be contrary to the narrow strictures to which courts have confined this tort.

Kirchner, 294 Ill.App.3d at 684, 691 N.E.2d at 117, 229 Ill.Dec. at 181.

Similarly, in *Stolz v. Wong Communications Ltd.*, 25 Cal.App.4th 1811, 31 Cal.Rptr.2d 229 (1994), the court held that an allegation of misuse of the Federal Communications Commission broadcast licensing process failed to state a cause of action for abuse of process because no actionable abuse of judicial process was alleged. The court specifically rejected an invitation to extend the tort of abuse of process to administrative proceedings, noting that such action "would not serve the purpose of the tort, which is to preserve the integrity *of the court*." (Emphasis in original.) *Id.* at 1823, 31 Cal.Rptr.2d at 236.

In *Crosspoint Associates, Inc. v. Papas*, No. 941749, 1994 WL 878943 (Mass.Super.Nov.7, 1994), the Massachusetts Superior Court cited to *Hillside Associates* and other authorities to hold that a nonmeritorious letter of complaint filed with the Army Corps of Engineers asserting violations of various environmental laws in an attempt to block a construction project could form the basis of a claim for malicious prosecution. However, the court rejected a contention that the complaint also stated a claim for abuse of process, finding that Massachusetts law "narrowly construed the parameters of an abuse of process action" as applicable only to process issued by a court. 1994 WL 878943 at *3. Other cases reaching similar results include *Sea-Pac Co. v. United Food Workers*, 103 Wash.2d 800, 699 P.2d 217 (1985) (holding that unfair labor practice charges could not form basis of action for

abuse of process because no process was issued by Washington courts and that whether union misused process of National Labor Relations Board was for board to decide); *Char v. Matson Terminals Inc.*, 817 F.Supp. 850 (D.Haw.1992); and *McCarthy v. KFC Corp.*, 607 F.Supp. 343 (D.C.Ky.1985) (holding that employer's allegedly non-meritorious resistance of appeal of unemployment compensation awards did not state claim for abuse of process because no judicial process involved).

We agree with the majority view that an action for abuse of process is historically based upon the need to protect the integrity of judicial process and should be narrowly construed to achieve that purpose. Accordingly, the district court did not err in sustaining the Bank's demurrer without leave to amend and in dismissing the action as to the Bank, based upon its finding that Gordon's allegations of abuse of administrative process failed to state a cause of action. In so holding, we do not decide whether or under what circumstances administrative proceedings could form the basis of an action for malicious prosecution, as those issues are not before us in this case.

2. Case No. S-97-1183

In this action against the individual officers and the state regulators, Gordon asserts two alternative theories of recovery: (1) abuse of process, based upon essentially the same factual allegations as those made in case No. S-97-1183, and (2) deprivation of his constitutional rights, in violation of § 1983. The district court sustained the individual officers' and the state regulators' demurrers and dismissed the action with prejudice, finding that the

order of dismissal entered by the district court for Lancaster County terminating the administrative proceedings was conclusive as to the claims asserted by Gordon in this action and could not be collaterally attacked. That order, however, is not part of the record. In his operative petition, Gordon alleges that the district court for Lancaster County "ultimately found the issue [raised in Gordon's appeal from the order of the Nebraska Department of Banking and Finance] 'moot' as a result of the sale of the Bank, and dismissed Plaintiff's appeal without reaching a decision on the merits."

The doctrine of res judicata bars relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) *the former judgment was on the merits,* and (4) the same parties or their privies were involved in both actions. State on Behalf of *Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998); *Acosta v. Seedorf Masonry, Inc.*, 253 Neb. 196, 569 N.W.2d 248 (1997). The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. *Acosta, supra*; *Robertson v. School Dist. No. 17*, 252 Neb. 103, 560 N.W.2d 469 (1997).

The rationale of the district court is problematic, in that Gordon's petition specifically alleges that the judgment of the district court for Lancaster County was not on the merits, but, rather, resulted from a determination of mootness. See *McCarney v. Ford Motor Co.*, 657 F.2d 230 (8th Cir.1981) (holding that judgment dismissing action as

moot is not conclusive in subsequent proceeding). However, we need not resolve this question, because we determine that the dismissal of this action was justified for other reasons. A proper result will not be reversed merely because it was reached for the wrong reasons. *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 576 N.W.2d 797 (1998); *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997). Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the appellate court will affirm. *Pettit v. Paxton*, 255 Neb. 279, 583 N.W.2d 604 (1998); *Boettcher v. Balka*, 252 Neb. 547, 567 N.W.2d 95 (1997). Our holding with respect to the abuse of process claim in case No. S-97-618 is dispositive of the similar claim asserted in this action. Gordon does not allege abuse of process issued by a court, and his petition therefore fails to state facts sufficient to constitute a cause of action under this theory of recovery.

Although the states have concurrent jurisdiction to entertain § 1983 actions, as a result of the Supremacy Clause found in U.S. Const. art. VI, federal law is controlling and preempts any conflicting state law in determining these claims. *Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988); *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994). In order to state a cause of action under § 1983, a plaintiff must allege facts establishing conduct by a person acting under color of state law which deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled on other*

grounds, Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). Gordon alleges that the individual officers and the state regulators conspired to deny him procedural due process and violated his "constitutional right to practice in his chosen profession and liberty interest in his reputation and prospects for further employment." Gordon further alleges that the individual officers and regulators acted "with the intent to restrain Plaintiff's First Amendment rights to free speech (i.e. on banking issues) and free association (i.e. representation of banking interests)" in "retaliation for prior exercise of Plaintiff's First Amendment rights and to deter future exercise of said rights." However, the only factual allegations pertaining to conduct directed at Gordon by the individual officers and the state regulators are (1) the issuance of an emergency order by the Department requiring Gordon to cease and desist from "managing, controlling, directing, or otherwise interfering with any aspect of the ongoing business" of the Bank and (2) the subsequent termination of the attorney-client relationship between the Bank and Gordon's law firm, as a result of which Gordon alleges to have "lost his position" with the firm. Gordon characterizes his claim as one alleging that "individuals working for the State of Nebraska and the United States Government conspired with private individuals to destroy the reputation, professional standing, earning ability, and employment of Richard Gordon." Reply brief for appellant at 8.

We are aware of no authority recognizing a constitutionally protected right of a lawyer to represent a particular client or work for a particular law firm. Such

relationships among private parties and entities are usually terminable at will or governed by contract. They do not constitute intimate human relationships or groups formed for the purpose of exercising First Amendment rights which are subject to a constitutionally protected freedom of association. See *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). Gordon does not allege any form of public employment which would implicate his freedom of speech under the First Amendment. See, e.g., *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53 (1997).

An injury to reputation by itself is not a liberty or property interest protected under the 14th Amendment. *Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991); *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); *Lynch v. City of Boston*, 989 F.Supp. 275 (D.Mass.1997). Likewise, the loss of outside private employment does not come within the ambit of a constitutionally protected property interest. *Id.* In general, any damages for loss of employment opportunities that flow from harm to reputation may be recoverable under state tort law, but not under § 1983. *Siegert, supra.*

Construing the operative petition in a light most favorable to Gordon, we conclude it does not contain factual allegations sufficient to constitute a cause of action under § 1983, because it does not allege a deprivation of a right, privilege, or immunity guaranteed by the Constitution or laws of the United States. In addition, we conclude that this deficiency cannot be cured by amendment. Therefore, although for reasons different from those stated by the district court, we conclude that it did

not err in sustaining the individual officers' and the state regulators' demurrers and dismissing this action.

VI. CONCLUSION

For the reasons stated in case No. S-97-618, we affirm the judgment of the district court with respect to appellee Community First State Bank of Nebraska but dismiss the appeal as to appellees Chapin, Raum, Kesslar, and Willnerd because of the absence of a final, appealable order necessary to confer appellate jurisdiction. The judgment of the district court in case No. S-97-1183 is affirmed.

JUDGMENT IN No. S-97-618 AFFIRMED IN PART, AND IN PART DISMISSED. JUDGMENT IN No. S-97-1183 AFFIRMED.

WHITE, C.J., not participating.

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

RICHARD L. GORDON, Plaintiff, v. COMMUNITY FIRST BANK OF NEBRASKA (formerly THE ABBOTT BANK), RICHARD J. CHAPIN, DARRELL RAUM, PAT KESLAR, TOM WILLNERD, JAMES A HANSEN, LUCINDA GLEN, and KENT PLUMMER, Defendants.	)	DOC. 947 NO. 430 **ORDER**

In his Fourth Amended Petition Plaintiff Richard L. Gordon asserts abuse of process and civil rights claims against: state agency Defendants James Hansen, Lucinda Glen, and Kent Plummer; and Abbott Bank Defendants Richard Chapin, Darrell Raum, Pal [sic] Keslar, and Tom Willnerd. He alleges that the bank Defendants – all officers of Abbott Bank – conspired with state regulators to procure factually unfounded administrative orders against Gordon as the Bank's general counsel. The bank officers' motivation was allegedly the preservation of their jobs. The regulators' purported motivation is not stated.

Plaintiff claims that the Defendants induced the entry of a baseless order, enjoining him from acting as an unlicensed and unbonded officer of the Bank. He seeks damages attributable to the abusive exercise of legal process, and he also seeks damages for violations of his civil

rights under Title 42 USC §1983, including the loss of his reputation and employment.

The Defendants have demurred to Plaintiff's fourth Amended Petition, and the Court has concluded that their demurrer must be sustained. Further because the defects in Plaintiff's pleading cannot be remedied by amendment, a final order of dismissal ought to be entered, for the reason expressed below.

This action for damages was filed by the Plaintiff, rather than either complying with the administrative order of the Department of Banking – in securing a bank officer's license and designation; or in appealing the order, if indeed its entry was premised upon inadequate evidence. As such, this lawsuit is an impermissible collateral attack upon the administrative order of the Department of Banking and the final judgment of the District Court of Lancaster County (*Gordon v. State of Nebraska*, Doc. 523, No. 018). The administrative order, and the order in the Lancaster County District Court lawsuit that followed, conclusively establish that Gordon *did* act as an unlicensed control person in the affairs of the Abbott Bank. The only way for Gordon to continue that dispute would have been for him to appeal the Lancaster County order. He may not disregard that lawsuit and final order and simply start a separate lawsuit all over again, contesting the same issue here as the one that he pressed in the earlier administrative and legal forums. If such a course were permitted, there would be no end to litigation. *Dakota Title & Escrow Co. v. World-Wide Steel Systems, Inc.*, 238 Neb. 519 (1991).

IT IS THEREFORE ORDERED that Defendants' demurrers are sustained. Plaintiff's Fourth Amended Petition ought to be, and is, dismissed with prejudice to another future action, at Plaintiff's costs.

Dated this 14th day of October, 1997.

BY THE COURT:

/s/ John D. Hartigan, Jr.
District Judge

cc: Mr. D.C. Bradford
Mr. Terence P. Boyle
Mr. Joseph K. Meusey

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

RICHARD L. GORDON, Plaintiff, vs. COMMUNITY FIRST BANK OF NEBRASKA (formerly THE ABBOTT BANK), RICHARD J. CHAPIN, DARRELL RAUM, PAT KESLAR, TOM WILLNERD, JAMES A. HENSEN, LUCINDA GLEN, and KENT PLUMMER, Defendants.	DOC. 947 NO. 430 FOURTH AMENDED PETITION (Filed Aug. 7, 1997)

COMES NOW the Plaintiff, Richard L. Gordon, and for his cause of action against the Defendants, Richard J. Chapin ("Chapin"), Darrell Raum ("Raum"), Pat Keslar ("Keslar"), Tom Willnerd ("Willnerd") (hereinafter collectively referred to as "the Bank Defendants"); James A. Hansen ("Hansen"), Luncinda [sic] Glen ("Glen"), and Kent Plummer ("Plummer") (hereinafter collectively referred to as "Defendant Regulators") alleges as follows:

I.

PARTIES

1. The Plaintiff, Richard L. Gordon, is a resident of Omaha, Douglas County, Nebraska.

2. Chapin resides in Kansas City, Missouri. Throughout all times relevant to matters at issue herein, Chapin was an officer and President of the Bank.

3. Raum is a resident of Alliance, Nebraska. Throughout all times relevant to matters at issue herein, Raum was an officer of the Bank.

4. Keslar is a resident of Mullen, Nebraska. Throughout all times relevant to matters at issue herein, Keslar was an officer of the Bank.

5. Willnerd is a resident of Chadron, Nebraska. Throughout all times relevant to matters at issue herein, Willnerd was an officer of the Bank.

6. Hansen was, at all times material hereto, Director of the Nebraska Department of Banking.

7. Glen was, at all times material hereto, counsel for the Nebraska Department of Banking.

8. Plummer was, at all times material hereto, a senior Review Examiner for the Department of Banking.

II.

BACKGROUND

9. Prior to 1989, the Abbott Bank ("Bank") consisted of ten (10) independent banks in the Panhandle area of western Nebraska.

10. In 1989, a reorganization occurred that cause the merger of the ten (10) independent banks into the Bank.

11. During all times pertinent to the matters at issue herein, the Abbott Bank Group, Inc. ("ABGI") owned

approximately ninety-nine percent (99%) of the Bank's outstanding common stock. Mr. James E. Abbott ("Abbott") was the majority shareholder of ABGI and owned in excess of 66% of its outstanding Class A common shares.

12. Since 1978 the law firm of McGrath, North, Mullin & Kratz ("MNM&K") represented the banking interests of Abbott and his family.

13. Plaintiff, during all times pertinent to the matters at issue herein, was a shareholder, director and Vice President/Secretary of MNM&K. Plaintiff was also a member of MNM&K's executive committee. From early 1987, Plaintiff was general counsel to the Bank and ABGI. He was responsible for managing the legal services rendered by MNM&K to the Bank and its holding company until the Bank Defendants terminated the Bank's relationship with Plaintiff and MNM&K as hereinafter set forth. The relationship between the Bank and Plaintiff was founded on an oral contract which followed the Bank Board of Director's appointment of Plaintiff as General Counsel and MNM&K as lawyers for the Bank. Under the terms of the agreement, Plaintiff was required to advise the Bank and James E. Abbott on all affairs of the Bank. Services rendered to the Bank as the General Counsel were billed to the Bank by MNM&K.

14. In the 1980's the banks comprising the Abbott Bank Group were under extreme pressure from a sagging agricultural economy. As a result, Abbott reorganized the banks into the Bank.

15. This reorganization caused each of the Abbott banks to lose their local name, their autonomy, and their

existing boards of directors. The changes created an atmosphere of antagonism toward Abbott and those perceived to have been involved in leading and assisting such change.

16. The reorganization called for reduction in staff and tighter loan controls and collections, all of which caused managerial problems for the Bank.

III.

THE SALE

17. In the early summer of 1990, Plaintiff advised Abbott that unless the Bank management and leadership issues were addressed, it was likely that the Bank's legal, consulting and other professional expense would increase significantly. Abbott elected not to replace management. Instead, he decided to sell the Bank. Abbott told his financial advisor, Morris R. Shields ("Shields"), and Plaintiff of his decision. He asked Plaintiff and Shields to keep the matter confidential, but to use their best efforts to pursue the ultimate objective.

18. During the fall of 1992 and early 1993, Abbott, Plaintiff and Shields held a series of discussions with William Blair & Co., an investment banking firm based in Chicago, Illinois ("Blair"). During these discussions Abbott directed Plaintiff and Shields to advise Blair of his desire to sell the Bank, instead of addressing the management issues.

19. In March of 1992, Defendant Chapin was hired by the Bank as its Chief Financial Officer. In early 1993 Randy A. Gould ("Gould"), who had been the Chief

Operating Officer, was appointed President and Chief Executive Officer of the Bank.

20. In June, 1993, ABGI entered into a formal written agreement with Blair to engage its services in selling the Bank. Abbott requested Plaintiff and Shields to inform Walt Griffis, a member of the Bank's Executive Committee, of his decision to hire Blair to sell the Bank instead of restructuring the Bank's management. To avoid further fear and anxiety within the Abbott organization, Griffis agreed with Abbott that the decision to hire Blair to sell the Bank should remain confidential. Only those members of management who "needed to know" would be informed until such time as Blair was in a position to release its Offering Memorandum. Neither Gould nor Chapin were informed of Abbott's decision to engage Blair at that time.

21. In July, 1993, Abbott requested Plaintiff and Shields to advise Chapin that Abbott intended to sell the Bank. Chapin then joined in the discussions with Abbott, Plaintiff, Shields and Griffis to provide financial information to Blair for its preparation of an Offering Memorandum. Chapin pledged his cooperation. He also made suggestions as to management changes which ultimately resulted in the removal of Randy A. Gould and Chapin's installation as President and Chief Executive Officer of the Bank. Chapin was also made a member of the Bank's Board of Directors and Executive Committee.

V.

THE CONSPIRACY

22. Chapin's support of Abbott's plan to sell the Bank was feigned. Chapin, along with the other Bank Defendants, Raum, Keslar, and Willnerd, feared the loss of their jobs and control of the Bank.

23. Chapin then involved them in a conspiracy to prevent the sale of the Bank and remove Abbott from control.

24. In order to accomplish the foregoing plan, the Bank Defendants determined that to remove Abbott from control, they must first remove Plaintiff from his position as general counsel and MNM&K as legal counsel to the Bank.

25. To carry out their objective each began to secretly discredit the motives and abilities of Abbott and Plaintiff. They attempted to attract sufficient regulatory disapproval to cause Abbott's removal and prevent his plan to sell the Bank, or control the terms of any sale. At all times material herein, the Bank Defendants, acting as officers of the Bank, engaged in the following activities:

(a) attacking the viability of the newly developed credit card operation;

(b) attacking the ability of Abbott to set Bank policy and to counsel with Plaintiff, MNM&K, Coopers & Lybrand and other advisors;

(c) attacking Plaintiff as having too much control over the affairs of the Bank;

(d) attacking the financial condition of the Bank;

(e) attempting to place the Bank in various conditions of default of its obligations to its primary lender and regulators;

(f) alleging that the Bank illegally paid Abbott's personal legal and accounting expenses;

(g) failing to timely produce a business plan for the Bank;

(h) attacking the legal fees of MNM&K;

(i) attacking the accounting fees of Coopers & Lybrand;

(j) attacking the advertising fees and services of Lovgren Advertising; and

(k) threatening to quit their respective services to the Bank unless the regulators supported them in their efforts to "get rid of" Plaintiff and Abbott.

26. As Abbott's efforts to sell the Bank moved ahead, it became clear to Chapin, Raum, Keslar and Willnerd that their actions were not stopping the efforts of Abbott and Plaintiff to sell the Bank. They realized that should a sale occur or their opposition be discovered they would face termination. It therefore became imperative that they take immediate action to prevent Abbott's efforts.

27. In the fall of 1993 and into the winter of 1994, the Bank Defendants decided to take advantage of an atmosphere of hostility toward Plaintiff which they had helped create. The Bank Defendants conspired to take

control of the Bank's operations from Abbott and the Board of Directors of the Bank. Then the Bank Defendants positioned themselves to insure that when Abbott was removed from control, any sale of the Bank could not take place without their participation and only if they were paid sums over and above the consideration paid to stockholders. These individuals formed a joint plan or agreement with the intent of controlling the Bank so that any potential buyer would have to deal with them and thereby preserve their influence and jobs.

28. To accomplish their ulterior purpose the Bank Defendants had to devise a plan involving the Defendant Regulators. The plan had to cut off Abbott's efforts to sell the Bank by eliminating Abbott, Plaintiff, MNM&K and Blair, while at the same time making it impossible for the Bank Defendants to be discharged by Abbott once he discovered their subterfuge.

29. In December, 1993 Chapin hired an attorney to represent the Bank without disclosure or approval of Abbott or the Board of Directors of the Bank or ABGI. The fact that an attorney had been engaged at this time was intentionally and deliberately concealed from the Board, including its Executive Committee.

30. The Bank Defendants began a series of covert discussions with the Department of Banking, the FDIC, and the FED, wherein they made material misrepresentations, to-wit:

(a) that under Abbott, the Bank was engaged in unsound banking practices and violated the law in permitting Plaintiff, the Bank's

general counsel, to act as an unlicensed executive officer;

(b) that the Bank was in a very perilous financial condition; and

(c) that the Bank "was in imminent danger of failure".

That the above misrepresentations were made with the explicit intention to cause the regulators to take actions which would further the plans of these the Bank Defendants as set forth in Paragraphs 27 and 28 above.

31. On January 27, 1994, in a clandestine meeting in a York, Nebraska, motel, Chapin and the Bank's attorney met with Defendant Lucinda Glen, counsel for the Banking Department, and Defendant Kent Plummer, a review examiner for the Banking Department. Richard Anderson and Richard Jarvis of the FDIC participated in the meeting by telephone. No directors or owners of the Bank were aware of this meeting or of the Bank Defendants' activities to this point. In fact, the Bank Defendants continued to intentionally conceal their contacts with representatives of governmental agencies regulating the Bank in an effort to deceive Abbott and his advisors, including Plaintiff. On the one hand, Chapin, as President of the Bank was advising the Defendant Regulators that the Bank was failing. At the same time, he was telling the Board of Directors of the Bank and ABGI that management was proposing a budget for 1994 that projected a "baseline budget" with net income of $1.54 million and a "stretch budget" with net income of $2.3 million. Chapin also presented the final 1994 budget to representatives of First Bank, ABGI's primary lender in February, 1994. Chapin did not advise First Bank that the Bank and ABGI

were in "imminent danger of failure" as he had advised the Defendant Regulators several weeks earlier.

32. As a result of the discussions between the Bank Defendants, the Defendant Regulators and representatives of the FED and the FDIC, the following actions were taken and processes issued without verification, investigation or notice, to-wit:

(a) On or about February 14, 1994, the FDIC issued an Order of Investigation against the Bank stating that it had reasonable cause to believe that institution-affiliated parties engaged or participated in unsafe or unsound banking practices and violations of law and regulations.

(b) On February 28, 1994 the FDIC began an investigation of the Bank and issued subpoenas to carry out the investigation. The subpoenas were issued to a number of parties, including Plaintiff, Abbott, MNM&K, Coopers & Lybrand, Shields and others.

(c) On March 10, 1994 the Department of Banking entered an ex parte "Emergency Order" pursuant to Neb. Rev. Stat. Sections 8-1,134 to 8-1,139 (Reissue 1991) ordering that the Bank could not terminate any officer of the Bank or force, require or coerce any officer to resign without written approval from the Department and the FDIC. A copy of said Order is attached hereto as Exhibit "A".

(d) On the next day, March 11, 1994, the Department issued another ex parte "Emergency order" . . . wherein it found that Plaintiff was acting as an unlicensed executive officer in

violation of Neb. Rev. Stat. Section 8-139 (Reissue 1991) and 45 NAC 28 and ordered the Bank to immediately cease and desist from the practice of allowing Plaintiff to act or attempt to act, as an executive officer of the Bank. Copies of this Emergency Order (or an approved summary thereof) were directed to be served on "all officers and employees of Bank, wherever located or employed". It is believed this action was specifically intended to "intimidate" each and every officer and employee of the Bank "wherever located or employed". Plaintiff was likewise enjoined. A copy of said order is attached hereto as Exhibit "B".

33. That, at some point in time between February 28, 1994 and March 10, 1994, the Defendant Regulators and the Bank Defendants agreed to act in concert with each other. These Defendants agreed to work together to wrest control of the Bank from Abbott, to remove Gordon from involvement with the Bank, to restrict the sale of the bank and to attempt to guarantee the continued employment of the Bank Defendants by the Abbott Bank. That, at the time this agreement was entered into, all Defendants knew that the allegations set forth herein made by the Bank Defendants to the Defendant Regulators were false. All acts alleged to have been committed by all the Defendants after March 9, 1994 were done pursuant to and in furtherance of this agreement.

34. Subsequent to March 10, 1994, the Bank Defendants, with the help and support of the Defendant Regulators, began to pressure and intimidate members of the Executive Committee without disclosing their series of "clandestine meetings" with the Defendant Regulators.

With the help of the Defendant Regulators, the Bank Defendants acted through the Executive Committee to pursue their goal of eliminating Abbott and Plaintiff by providing false and misleading information concerning the financial condition of the Bank to the Defendant Regulators. In addition, they set up a procedure that effectively prevented any Bank employee from having any contact with Plaintiff or MNM&K thereby eliminating Plaintiff's ability to act as General Counsel and MNM&K to act as lawyers for the Bank.

35. Plaintiff immediately and timely requested a hearing regarding the Emergency Order on March 18, 1994. The Department of Banking provided a copy of the Emergency Order (Exhibit "B") to the "Omaha World-Herald" newspaper. The newspaper published a series of articles after receiving a copy of such order disclosing confidential information provided by the Bank to the Department of Banking.

FIRST CAUSE OF ACTION – ABUSE OF PROCESS

36. As a direct and proximate result of the foregoing actions full control of the Bank was placed in the hands of Chapin, Raum, Keslar and Willnerd. The Bank Defendants ran the Bank without the input or interference of its principal shareholder, Abbott. The Bank Defendants moved quickly to terminate the Bank's relationship with the Plaintiff and MNM&K. It did so in March of 1994, soon after the Emergency Orders were served. The Bank Defendants also terminated the Bank's relationship with Coopers & Lybrand and Lovgren Advertising. The Bank

Defendants also attempted to stop Blair's efforts to sell the Bank.

37. The Bank Defendants and the Defendant Regulators united to sustain the "Emergency Order" of the Department of Banking against Plaintiff, despite the fact that no "emergency" existed. The Bank earned over $2 million in 1994 consistent with the budget approved by the Bank in February, 1994 before the emergency examinations began.

38. The Defendant Regulators took great pains to prevent being confronted with facts that did not support their preconceptions, i.e., they made no inquiry of Abbott, Plaintiff, Shields, MNM&K, Coopers & Lybrand or the Board of Directors. They prevented representatives of Blair from presenting information in conflict with the position that they had assumed. Soon after the Bank Defendants gained control of the Bank, it became clear to the Defendant Regulators, from their own investigations, that the representations of the Bank Defendants were untrue. The Defendant Regulators also learned that the newly acquired credit card operation was profitable and had substantial value. Rather than react to the truth of what they learned, the Defendant Regulators brought the full power of their respective regulatory process to bear. Specifically, with the Bank Defendants' support, the Department of Banking, FDIC and the FED took action against Abbott's advisors including Plaintiff which included a potential felony charge punishable by up to 5 years imprisonment. Instead of acknowledging the true condition of the Bank, the Defendant Regulators asserted that the financial condition of the Bank and ABGI had deteriorated significantly. The FDIC and FED sent the

Bank letters finding that the Bank was a "troubled institution". It is believed that this action was taken by the Defendant Regulators to retroactively justify the extraordinary actions they took against Plaintiff.

39. Following the termination of Plaintiff and MNM&K by the Bank, and as a direct and proximate result of that termination, the Plaintiff lost his position with MNM&K.

40. Following his termination as General Counsel for the Bank, Plaintiff elected to fight to recover the value of his name and reputation by appealing the "Emergency Orders."

41. In order to cut off Plaintiff's right of appeal and as part of the overall scheme, the Bank Defendants, with the full support and contribution of the Defendant Regulators, filed pleadings prior to the hearing that "admitted" the allegations supporting the Department of Banking's "ex parte orders". In so doing, the Bank Defendants and the Defendant Regulators exposed not only Plaintiff, but the Bank, its Board of Directors and Abbott to criminal prosecution.

42. However, on appeal, the hearing officer, the Honorable John Grant, saw the Bank Defendants' and the Defendant Regulators' abusive scheme for what it was, exposed it, and sought to stop further administrative abuse against Plaintiff. By his Recommendations and Order of November 9, 1994, Judge Grant called for the "emergency" orders to be set aside, finding that the Department of Banking had failed to carry its burden of proof with regard to the allegations against Plaintiff, finding that no "emergency" existed.

43. On or about November 28, 1994 Community First Bankshares, Inc. and ABGI entered into a definitive Agreement and Plan of Merger and the Defendant Regulators were promptly informed of the said Agreement. At this point two facts were clear: (1) the efforts of the Bank Defendants, and the Defendant Regulators, to hinder if not prevent the sale, were unsuccessful; (2) there was never an emergency or other threat to the financial condition of the Bank which justified the actions taken by the Department of Banking or the F.D.I.C.. Nevertheless, on December 22, 1994 Defendant Hansen rejected Judge Grant's findings and recommendations and drafted an Order affirming the conclusions contained in his original Emergency Orders to cease and desist. It was only when Plaintiff appealed this Order that the Department of Banking raised the issue of "mootness" before the District Court of Lancaster County, Nebraska. Said Court ultimately found the issue "moot" as a result of the sale of the Bank, and dismissed Plaintiff's appeal without reaching a decision on the merits.

44. On May 11, 1995 Community First Bankshares, Inc. ("Community First") acquired the Bank after receiving appropriate regulatory approval. The aggregate purchase price was almost $34 million in cash for an organization that the Defendant Regulators characterized as being a "troubled institution" on the verge of failure. Simultaneous with the merger, Community First sold the credit card receivables of the Bank for around $10 million.

45. The actions of the Bank Defendants and the Defendant Regulators were abusive, malicious, arrogant and showed reckless disregard for the rights of Abbott and Plaintiff. The Bank Defendants, as individuals and

conspirators with the Defendant Regulators, attempting to secure their own financial gain, caused the issuance of Emergency Orders and abusively pursued their application to prevent Abbott from having the representation of his choice as he worked to sell the Bank and thereby assure the Bank Defendants they could control the terms of any sale to protect their own interest.

46. As a result of the Bank Defendants' and the Defendant Regulators' actions, Plaintiff was held up to ridicule and scorn, especially among members of the legal and banking communities. He lost his partnership interest in MNM&K and the income it had provided. He has been and continues to be unable to practice law in the areas of his expertise.

47. As a direct and proximate result of the Bank Defendants' and the Defendant Regulators' abuse of process, Plaintiff has sustained the following damages, which are presently ongoing, to-wit:

1. Loss of income;

2. Loss of reputation; and

3. Loss of opportunity to practice law.

WHEREFORE, Plaintiff, Richard L. Gordon, prays for judgment against the Bank Defendants and the Defendant Regulators for special damages in the amount of $10,000,000.00, general damages, and such other damages as may be proven at trial, and for his costs herein expended.

SECOND CAUSE OF ACTION – 42 U.S.C. 1983

48. The claims for relief herein arise under the First, Fifth, and Fourteenth Amendments to the United States Constitution, 42 U.S.C. 1983.

49. Plaintiff, relying on the United States Supreme Court's opinion in *Paul v. Davis*, 424 U.S. 693 (1976), at all times material hereto, possessed a liberty interest in his reputation when accompanied by his right to employment in his chosen profession.

50. Plaintiff's liberty interest was harmed by the Defendant Regulators, as set forth below, in violation of the Fourteenth Amendment to the United States Constitution, by the acts of the Bank Defendants and the Defendant Regulators.

51. Richard Anderson ("Anderson") was, at all times material hereto, employed by the Federal Deposit Insurance Corporation (FDIC).

52. Richard Jarvis ("Jarvis") was, at all times material hereto, employed by the Federal Deposit Insurance Corporation (FDIC).

53. At all time [sic] material hereto, the Defendant Regulators, as officers and/or agents of the Nebraska Department of Banking, were acting under color of state law.

54. The Bank Defendants, along with Anderson and Jarvis (and other agents and employees of the FDIC, whose identities are as yet unknown to the Plaintiff) were involved in a conspiracy, as set forth above in Paragraph 33, with the Defendant Regulators for the purposes of injuring the Plaintiff.

55. In support of this conspiracy, the Bank Defendants provided misleading documents, records, reports, and other materials, both oral and written, to the Defendant Regulators and the FDIC, which falsely portrayed the financial condition of the Bank as "failing" or "in serious financial trouble" when they knew the financial condition of the Bank to be stable.

56. Many of said documents and/or reports were contained in a three ring binder assembled by Defendant Chapin and provided to the Defendant Regulators during the clandestine meeting in York, Nebraska, set forth above.

57. The purpose of preparing and distributing these misleading reports to the state and federal agencies was to further the Bank Defendants' and the Defendant Regulators' conspiratorial goals of removing Abbott and Plaintiff from the Bank and preventing the sale of the Bank.

58. The Bank Defendants continued to provide misleading information concerning the financial condition of the Bank to the state and federal agencies, even after the Defendant Regulators and the FDIC began to realize that the Bank was not in troubled financial condition.

59. At all times pertinent hereto, the Defendant Regulators participated in this conspiracy while acting under color of state law as officers and/or agents of the Department of Banking.

60. All the actions of the Bank Defendants and the Defendant Regulators, along with those of Anderson and Jarvis, were done in furtherance of this conspiracy to remove Abbott and Plaintiff from the Bank and justify the

actions of the Defendant Regulators and the FDIC in issuing orders and filing charges against Plaintiff.

61. The Bank Defendants, along with Anderson and Jarvis, by conspiring with the Defendant Regulators, were acting under color of state law.

62. The above-named conspirators committed acts, each of which were violative of Plaintiff's constitutional right to practice in his chosen profession and liberty interest in his reputation and prospects for further employment.

63. These conspirators violated 42 U.S.C. Sec. 1983 by depriving Plaintiff of these rights secured by the First, Fifth and Fourteenth Amendments of the Constitution of the United States.

64. The Bank Defendants, by conspiring with the Defendant Regulators (and Jarvis and Anderson), are responsible with their co-conspirators for the state and federal actors depriving, or attempting to deprive, Plaintiff of his rights to procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution, in the following particulars:

(a) By acting in an unreasonable, arbitrary, and capricious manner;

(b) By issuing an "emergency" order when no emergency existed.

(c) In causing injunctions and orders to issue from the Department of Banking to the detriment of the Bank and the Plaintiff without first attempting to investigate or verify the allegations made against the Bank and Plaintiff.

(d) In rejecting and refusing to investigate or acknowledge facts that did not support their positions.

(e) In failing and refusing to inform Plaintiff of their adverse actions prior to issuing orders affecting his livelihood and reputation.

(f) In continuing adverse actions against Plaintiff after it became clear that no "emergency" existed.

(g) In attempting to assert that the financial condition of the Bank and ABGI had deteriorated significantly, when they knew this was untrue.

(h) In taking the actions set forth in the paragraph above in order to retroactively justify the actions they had previously taken against Plaintiff.

(i) In having Hansen determine the validity of Judge Grant's Recommendations and findings when Hansen was personally prejudiced against Plaintiff.

(j) In having Hansen determine the validity of Judge Grant's Recommendations and findings when these findings were based on credibility determinations and Hansen had no opportunity to observe the conduct of the witnesses so as to assess their credibility.

(k) In having Hansen determine the validity of Judge Grant's Recommendations and findings when the integrity of Hansen's employees and co-workers was a substantial issue.

(l) In making findings of fact and issuing orders which were unsupported by evidence.

(m) In pursuing actions against the Plaintiff based upon personal and professional animosity towards him, rather than upon dispassionate discharge of their duties under state law.

65. The actions of the Bank Defendants, the Defendant Regulators and their co-conspirators were done with the intent to restrain Plaintiff's First Amendment rights to free speech (i.e., on banking issues) and free association (i.e., representation of banking interests). These actions were done both in retaliation for prior exercise of Plaintiff's First Amendment rights and to deter future exercise of said rights.

66. The actions of the Bank Defendants, the Defendant Regulators and their co-conspirators caused Plaintiff to suffer general opprobrium in his community and to endure a severe stigma on his professional and personal reputation in the eyes of his professional peers, the general geographic community and the wider community of the banking profession, of which Plaintiff has been regarded heretofore as an outstanding member.

67. Through wide newspaper coverage and word of mouth throughout the banking community, the Bank Defendants, the Defendant Regulators and their co-conspirators have so stigmatized Plaintiff's professional and personal reputation that Plaintiff can no longer earn a living in the only profession for which he is trained, thereby depriving him of him [sic] freedom to take advantage of other business opportunities in his profession.

68. The actions of the Bank Defendants and the Defendant Regulators, set forth above, have harmed

Plaintiff's liberty interest by depriving him of his reputation plus a serious additional harm, damage to his prospects for future employment in his profession, in violation of the Fourteenth Amendment to the United States Constitution.

69. Plaintiff is entitled to recover a reasonable attorneys fee pursuant to 42 U.S.C. Section 1988.

70. Plaintiff incurred substantial attorneys fees and costs as a result of the actions of the Bank Defendants, the Defendant Regulators and their co-conspirators.

WHEREFORE, Plaintiff, Richard L. Gordon, prays for judgment against the Bank Defendants, and each of them, for $10,000,000.00 actual damages, $10,000,000.00 punitive damages, for the attorneys fees and costs incurred in defending Plaintiff from the above actions, for his costs herein expended and for a reasonable attorneys fee.

RICHARD L. GORDON,
Plaintiff

BY: /s/ D. C. Bradford
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February 18, 1999

D. C. Bradford
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IN CASE OF: S-97-0618, Gordon v. Community First Bank of Nebraska

Applt/Motion for Rehearing (97-618/1183) **filed** 12/14/98 **has been reviewed by the court and the following order entered:**

Motion of appellant for rehearing overruled.

Respectfully,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Neb. Rev. Stat. § 8-1,134. Violations; director; powers; fines; notice; hearing; closure; emergency powers; service; procedures. (1) Whenever the Director of Banking and Finance has reason to believe that a violation of any provision of Chapter 8 or of the Credit Union Act or any rule, regulation, or order of the Department of Banking and Finance has occurred, he or she may cause a written complaint to be served upon the alleged violator. The complaint shall specify the statutory provision or rule, regulation, or order alleged to have been violated and the facts alleged to constitute a violation thereof and shall order that necessary corrective action be taken within a reasonable time to be prescribed in such order. Any such order shall become final as to any person named in the order unless such person requests, in writing, a hearing before the director no later than ten days after the date

such order is served. In lieu of such order, the director may require that the alleged violator appear before the director at a time and place specified in the notice and answer the charge complained of. The notice shall be delivered to the alleged violator or violators in accordance with subsection (4) of this section not less than ten days before the time set for the hearing.

(2) The director shall provide an opportunity for a fair hearing to the alleged violato. at the time and place specified in the notice or any modification of the notice. On the basis of the evidence produced at the hearing, the director shall make findings of fact and conclusions of law and enter such order as in his or her opinion will best further the purposes of Chapter 8 or the Credit Union Act and the rules, regulations, and order of the department. Written notice of such order shall be given to the alleged violator and to any other person who appeared at the hearing and made written request for notice of the order. If the hearing is held before any person other than the director, such person shall transmit a record of the hearing together with findings of fact and conclusions of law to the director. The director, prior to entering his or her order on the basis of such record, shall provide opportunity to the parties to submit for his or her consideration exceptions to the findings or conclusions and supporting reasons for such exceptions. The order of the director shall become final and binding on all parties unless appealed to the district court of Lancaster County as provided in section 8-1,135. As part of such order, the director may impose a fine, in addition to the costs of the investigation, upon a person found to have violated any provision of Chapter 8, the Credit Union Act, or the rules,

regulations, or orders of the department. The fine shall not exceed ten thousand dollars per violation for the first offense and twenty-five thousand dollars per violation for a second or subsequent offense involving a violation of the same provision of Chapter 8, the Credit Union Act, the rules and regulations of the department, or the same order of the department. The fines and costs shall be in addition to all other penalties imposed by the laws of this state, shall be collected by the director, and shall be remitted to the State Treasurer. Costs shall be credited to the Financial Institution Assessment Cash Fund, and fines shall be credited to the permanent school fund. If a person fails to pay the fine or costs of the investigation, a lien in the amount of the fine and costs shall be imposed upon all of the assets and property of such person in this state and may be recovered by suit by the director. The lien shall attach to the real property of such person when notice of the lien is filed and indexed against the real property in the office of the register of deeds in the county where the real property is located. The lien shall attach to any other property of such person when notice of the lien is filed against the property in the manner prescribed by law.

(3) Whenever the director finds that an emergency exists requiring immediate action to protect the safety and soundness of the institutions under the supervision and control of the department, the director may, without notice or hearing, issue an order reciting the existence of an emergency and requiring that such action be taken as the director deems necessary to meet the emergency. Notwithstanding the provisions of subsection (2) of this section, the order shall be effective immediately. Any person

to whom such order is directed shall comply immediately, but on application to the director shall be afforded a hearing as soon as possible and not later than ten days after such application by the affected person. On the basis of the hearing, the director shall continue the order in effect, revoke it, or modify it. This subsection shall not apply to a determination of necessary acquisition made by the department pursuant to sections 8-1506 to 8-1510.

(4) Except as otherwise expressly provided, any notice, order, or other instrument issued by or under authority of the director shall be served on any person affected thereby either personally or by certified mail, return receipt requested. Proof of service shall be filed in the office of the director.

Every certificate or affidavit of service made and filed as provided in this subsection shall be prima facie evidence of the facts stated in the certificate or affidavit, and a certified copy shall have the same force and effect as the original.

(5) Any hearing provided for in this section may be conducted by the director, or by any member of the department acting in his or her behalf, or the director may designate hearing officers who shall have the power and authority to conduct such hearings in the name of the director at any time and place. A verbatim record of the proceedings of such hearings shall be taken and filed with the director, together with findings of fact and conclusions of law made by the director or hearing officer. The director may subpoena witnesses, and any witness who is subpoenaed shall receive the same fees as in civil actions in the district court and mileage as provided in

section 81-1176. In case of contumacy or refusal to obey a notice of hearing of subpoena issued under this section, the district court of Lancaster County shall have jurisdiction, upon application of the director, to issue an order requiring such person to appear and testify or produce evidence as the case may require. Failure to obey such order of the court may be punished by such court as contempt.

If requested to do so by any party concerned with such hearing, the full stenographic notes, or tapes of an electronic transcribing device, of the testimony presented at such hearing shall be taken and filed. The stenographer shall, upon the payment of the stenographer's fee allowed by the court, furnish a certified transcript of all or any part of the stenographer's notes to any party to the action requiring and requesting such notes.

(6) The director may close to the public the hearing, or any portion of the hearing, provided for in this section when he or she finds that the closure is (a) necessary to protect any person, or any financial institution or entity under the department's jurisdiction, against unwarranted injury or (b) in the public interest. The director shall close no more of the public hearing than is necessary to attain the objectives of this subsection.

Neb. Rev. Stat. § 8-1,135. Appeal; procedure. Any person aggrieved by a final order of the Director of Banking and Finance made pursuant to section 8-1,134 may appeal

the order, and the appeal shall be in accordance with the Administrative Procedure Act.

Neb. Rev. Stat. § 8-1,136. Action to enjoin and enforce compliance. Whenever it appears to the Director of Banking and Finance that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of Chapter 8 or the Credit Union Act, he or she may bring an action in the name of the director and the Department of Banking and Finance in any court of competent jurisdiction to enjoin any such acts or practices and to enforce compliance with the provisions of Chapter 8 or the Credit Union Act. Upon a proper showing, a permanent or temporary injunction, restraining order, or writ of mandamus shall be granted and a receiver or conservator may be appointed for the defendant's assets. The director shall not be required to post a bond.

Neb. Rev. Stat. § 84-913.04. Proceedings; limitation on participation. (1) A person who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as hearing officer or assist or advise a hearing officer in the same proceeding except as provided in subsection (3) of this section.

(2) A person who is subject to the authority, direction, or discretion of one who has served as investigator,

prosecutor, or advocate in a contested case or in its prehearing stage may not serve as hearing officer or assist or advise a hearing officer in the same proceeding except as provided in subsection (3) of this section.

(3) If all parties consent, a person who has served as, or who is subject to the authority, direction, or discretion of one who has served as, investigator, prosecutor, or advocate in a contested case or in its prehearing stage may assist a hearing officer in the preparation of orders.

(4) A person who has participated in a determination of probable cause or other equivalent preliminary determination in a contested case may serve as hearing officer or assist or advise a hearing officer in the same proceeding.

(5) A person may serve as hearing officer at successive stages of the same contested case.

Neb. Rev. Stat. § 84-914. Contested cases; evidence; procedure; ex parte communications. In contested cases:

(1) An agency may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs and exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence. An agency shall give effect to the rules of privilege recognized by law. Any party to a formal hearing before an agency, from which a decision may be appealed to the courts of this state, may request that the agency be bound by the rules

of evidence applicable in district court by delivering to the agency at least three days prior to the holding of the hearing a written request therefor. Such request shall include the requesting party's agreement to be liable for the payment of costs incurred thereby and upon any appeal or review thereof, including the cost of court reporting services which the requesting party shall procure for the hearing. All costs of a formal hearing shall be paid by the party or parties against whom a final decision is rendered;

(2) The hearing officer or a designee, at the request of any party or upon the hearing officer's own motion, may administer oaths and issue subpoenas, discovery orders, and protective orders in accordance with the rules of civil procedure except as may otherwise be prescribed by law. Subpoenas and orders issued under this subsection may be enforced by the district court;

(3) All evidence including records and documents in the possession of the agency of which it desires to avail itself shall be offered and made a part of the record in the case. No factual information or evidence other than the record shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts or incorporated by reference;

(4) Every party shall have the right of cross-examination of witnesses who testify and shall have the right to submit rebuttal evidence;

(5) An agency may take official notice of cognizable facts and in addition may take official notice of general,

technical, or scientific facts within its specialized knowledge and the rules and regulations adopted and promulgated by such agency. Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of material so noticed. Parties shall be afforded an opportunity to contest facts so noticed. The record shall contain a written record of everything officially noticed. An agency may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it; and

(6)(a) No party in a contested case or other person outside the agency having an interest in the contested case shall make or knowingly cause to be made an ex parte communication to the hearing officer or to an agency head or employee who is or may reasonably be expected to be involved in the decisionmaking process of the contested case.

(b) No hearing officer or agency head or employee who is or may reasonably be expected to be involved in the decisionmaking process of the contested case shall make or knowingly cause to be made an ex parte communication to any party in a contested case or other person outside the agency having an interest in the contested case.

(c) No agency head or employee engaged in the investigation or enforcement of a contested case shall make or knowingly cause to be made an ex parte communication to a hearing officer or agency head or employee who is or may reasonably be expected to be involved in the decisionmaking process of the contested case.

(d) The hearing officer or agency head or employee who is or may reasonably be expected to be involved in the decisionmaking process of the contested case who receives or who makes or knowingly causes to be made an ex parte communication set forth in subdivisions (6)(a) through (c) of this section shall file in the record of the contested case (i) all such written communications, (ii) memoranda stating the substance of all such oral communications, and (iii) all written responses and memoranda stating the substance of all oral responses to all the ex parte communications. The filing shall be made within two working days of the receipt or making of the ex parte communication. Notice of the filing, with an opportunity to respond, shall be given to all parties of record.

(e) The prohibitions of subdivision (6) of this section shall apply beginning at the time notice for hearing is given. An agency may designate an earlier time, but such earlier time shall be required to be set forth in the agency's rules of procedure.

(f) The prohibitions contained in subdivisions (6)(a) and (b) of this section shall not apply to ex parte communications to or from an elected official. However, the disclosure requirements contained in subdivision (6)(d) of this section shall apply to ex parte communications to or from an elected official.

Neb. Rev. Stat. § 84-915. Contested cases; orders; findings of fact; conclusions of law; notification. Every decision and order adverse to a party to the proceeding,

rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. Parties to the proceeding shall be notified of the decision and order in person or by mail. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed upon request to each party or his or her attorney of record.

Neb. Rev. Stat. § 84-917. Contested case; appeal; procedure. (1) Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review under the Administrative Procedure Act. Nothing in this section shall be deemed to prevent resort to other means of review, redress, or relief provided by law.

(2)(a) Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. All parties of record shall be made parties to the proceedings for review. If an agency's only role in a contested case is to act as a neutral factfinding body, the agency shall not be a party of record. In all other cases, the agency shall be a party of record. Summons shall be served within thirty days of the filing of the petition in the manner provided for service of a summons in a civil action. If the agency whose decision is appealed from is not a party of record, the

petitioner shall serve a copy of the petition and a request for preparation of the official record upon the agency within thirty days of the filing of the petition. The court, in its discretion, may permit other interested persons to intervene.

(b) A petition for review shall set forth: (i) The name and mailing address of the petitioner; (ii) the name and mailing address of the agency whose action is at issue; (iii) identification of the final decision at issue together with a duplicate copy of the final decision; (iv) identification of the parties in the contested case that led to the final decision; (v) facts to demonstrate proper venue; (vi) the petitioner's reasons for believing that relief should be granted; and (vii) a request for relief, specifying the type and extent of the relief requested.

(3) The filing of the petition or the service of summons upon such agency shall not stay enforcement of a decision. The agency may order a stay. The court may order a stay after notice of the application therefor to such agency and to all parties of record. If the agency has found that its action on an application for stay or other temporary remedies is justified to protect against a substantial threat to the public health, safety, or welfare, the court may not grant relief unless the court finds that: (a) The applicant is likely to prevail when the court finally disposes of the matter; (b) without relief, the applicant will suffer irreparable injuries; (c) the grant of relief to the applicant will not substantially harm other parties to the proceedings; and (d) the threat to the public health, safety, or welfare relied on by the agency is not sufficiently serious to justify the agency's action in the circumstances. The court may require the party requesting

such stay to give bond in such amount and conditioned as the court may direct.

(4) Within thirty days after service of the petition or within such further time as the court for good cause shown may allow, the agency shall prepare and transmit to the court a certified copy of the official record of the proceedings had before the agency. Such official record shall include: (a) Notice of all proceedings; (b) any pleadings, motions, requests, preliminary or intermediate rulings and orders, and similar correspondence to or from the agency pertaining to the contested case; (c) the transcribed record of the hearing before the agency, including all exhibits and evidence introduced during such hearing, a statement of matters officially noticed by the agency during the proceeding, and all proffers of proof and objections and rulings thereon; and (d) the final order appealed from The agency shall charge the petitioner with the reasonable direct cost or require the petitioner to pay the cost for preparing the official record for transmittal to the court in all cases except when the petitioner is not required to pay a filing fee. The agency may require payment or bond prior to the transmittal of the record.

(5)(a) When the petition instituting proceedings for review was filed in the district court before July 1, 1989, the review shall be conducted by the court without a jury on the record of the agency, and review may not be obtained of any issue that was not raised before the agency unless such issue involves one of the grounds for reversal or modification enumerated in subdivision (6)(a) of this section. When the petition instituting proceedings for review is filed in the district court on or after July 1,

1989, the review shall be conducted by the court without a jury de novo on the record of the agency.

(b) If the court determines that the interest of justice would be served by the resolution of any other issue not raised before the agency, the court may remand the case to the agency for further proceedings.

(6)(a) When the petition instituting proceedings for review was filed in the district court before July 1, 1989, the court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the agency decision is:

(i) In violation of constitutional provisions;

(ii) In excess of the statutory authority or jurisdiction of the agency;

(iii) Made upon unlawful procedure;

(iv) Affected by other error of law;

(v) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or

(vi) Arbitrary or capricious.

(b) When the petition instituting proceedings for review is filed in the district court on or after July 1, 1989, the court may affirm, reverse, or modify the decision of the agency or remand the case for further proceedings.

(7) The review provided by this section shall not be available in any case where other provisions of law prescribe the method of appeal.

Neb. Rev. Stat. § 84-918. District court decision; appeal. (1) An aggrieved party may secure a review of any judgment rendered or final order made by the district court under the Administrative Procedure Act by appeal to the Court of Appeals.

(2) When the petition instituting proceedings for review was filed in the district court before July 1, 1989, the appeal shall be taken in the manner provided by law for appeals in civil cases and shall be heard de novo on the record.

(3) When the petition instituting proceedings for review is filed in the district court on or after July 1, 1989, the appeal shall be taken in the manner provided by law for appeals in civil cases. The judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record.

Neb. Rev. Stat. § 84-919. Act; exclusive means of judicial review. Except as otherwise provided by law, the Administrative Procedure Act establishes the exclusive